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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GWAIN V. WALTERS, Defendant and Appellant.	A101971 (Solano County Super. Ct. No. VCR150522)

Defendant Gwain V. Walters's probation was extended by two years after he admitted to violating its terms. On appeal, he contends that the trial court erred in denying his motion to dismiss the probation revocation proceedings on speedy trial grounds. We affirm the judgment.

BACKGROUND

Charges and Plea Bargain

Defendant was charged in Solano County with reckless driving while evading a police officer (Veh. Code, § 2800.2, subd. (a); count I), assault with deadly weapon or by means likely to produce great bodily injury on a peace officer (Pen. Code, § 245, subd. (c); count II),[1] child abuse (§ 273a, subd. (a); count III), unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count IV), and driving while his license was

[1] All further statutory references are to the Penal Code unless otherwise indicated.

suspended or revoked for driving under the influence (Veh. Code, § 14601.2, subd. (a); count V).

According to a presentence report, a police patrol unit attempted to initiate a traffic stop on a vehicle defendant was driving. Defendant failed to stop, and led police on a car chase through a residential area, running two stop signs and driving at 50 miles per hour in a 25-mile-per-hour zone. At one point, defendant made a U-turn after turning onto a dead-end street, and drove his vehicle directly toward a police officer, forcing the officer to take evasive action to avoid injury. The vehicle eventually blew a tire and came to rest at the end of a dead-end parking lot. One of the four passengers in the vehicle was a minor child who was not in a safety seat during the chase. Defendant was apprehended later after fleeing on foot. Vehicle and license checks revealed that the car had been stolen in another state, and that defendant's license had been suspended at the time of the incident.

On November 13, 2000, pursuant to a plea bargain, defendant pleaded no contest to counts I and III, and the trial court dismissed the remaining counts on the People's motion. On December 22, 2000, the trial court suspended imposition of sentence and granted probation for three years, including a county jail term of six months.

Probation Revocation Proceedings/Speedy Trial Motion

On April 26, 2001, the probation department requested that a warrant issue for defendant's arrest based on an allegation that he failed to contact his probation officer following his release from county jail on March 10, 2001. On May 10, 2001, the trial court summarily revoked defendant's probation and issued a bench warrant for his arrest. He was arrested in San Mateo County on July 20, 2001.

Defendant made his first appearance on the probation violation 16 months later, on November 21, 2002. On November 26, 2002, defendant denied violating his probation and the matter was set for a probation revocation hearing. On December 12, 2002, defendant filed a "Motion to Terminate Probation for Speedy Trial Violation."

Defendant alleged the following facts in his speedy trial motion:

Defendant's July 20, 2001 arrest in San Mateo County had been on a San Mateo warrant as well as the May 10 Solano County warrant. San Mateo County sentenced defendant to two years in state prison. While in custody in the San Mateo County Jail, defendant attempted to file a demand pursuant to section 1381 to resolve the Solano County probation revocation case.[2] Jail officials told him he could only do that once he got to state prison. On December 10, 2001, San Mateo County delivered him to the Department of Corrections. In August 2002, while in state prison, defendant filled out a section 1381 demand and gave it to his counselor. He never received a copy of the demand back from the counselor indicating that it had been served. As of four days prior to his parole date, there was no detainer on defendant from Solano County. However, on the day of his expected release, defendant learned that Solano County had placed a hold on him, preventing his release on parole and causing him instead to be delivered to the custody of Solano County.

At the hearing on defendant's motion, defendant's counsel conceded that he was unable to prove the district attorney ever received any section 1381 demand from him. Counsel stated that she had put in a request for records with the Department of Corrections, but had not yet received a response. The trial court denied defendant's speedy trial motion without prejudice, stating that the motion "lack[ed] proof that the District Attorney was served." The court proposed that defendant could return for an

[2] Section 1381 provides in pertinent part as follows: "Whenever a defendant has . . . entered upon a term of imprisonment in a state prison . . . and at the time of the entry upon the term of imprisonment . . . there is pending, in any court of this state, any other indictment, information, complaint, or any criminal proceeding wherein the defendant remains to be sentenced, the district attorney of the county in which the matters are pending shall bring the defendant to trial or for sentencing within 90 days after the person shall have delivered to said district attorney written notice of . . . his or her desire to be brought to trial or for sentencing . . . . In the event that the defendant is not brought to trial or for sentencing within the 90 days[,] the court in which the charge or sentencing is pending shall, on motion or suggestion of the . . . defendant . . . or on its own motion, dismiss the action."

evidentiary hearing on the issue if he was able to locate persons who could prove that he filed a 1381 demand.

In February 2003, defendant admitted that he violated probation by failing to maintain contact with the probation department. His probation was reinstated and extended for two additional years. Defendant did not waive his right to appeal from the order extending his probation. This appeal followed.

DISCUSSION

Defendant maintains that the trial court should have dismissed the probation revocation proceedings pursuant to sections 1381 and 1203.2a.[3]

Failure to Comply with Section 1237.5

As a threshold matter, the People assert that defendant's appeal must be dismissed for failure to comply with section 1237.5.[4] According to the People, a certificate of probable cause was required under section 1237.5 because defendant is challenging the legality of the proceedings resulting in his admission of a probation violation, and is therefore seeking appellate review of the validity of the admission itself. (See *People v. Billetts* (1979) 89 Cal.App.3d 302, 306–308 (*Billetts*) [defendant may appeal from revocation of probation following admission of violation without complying with

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[3] Section 1203.2a establishes a procedure by which a defendant incarcerated in state prison, who is the subject of probation revocation proceedings brought in another case, may request in writing that the revocation issue be promptly decided by the court that placed him on probation. The defendant must stipulate that the issue can be decided in his absence and without being represented by counsel. If the defendant submits a request in compliance with section 1203.2a, and the court fails to either impose sentence or issue an order terminating its jurisdiction within 30 days, then the court loses jurisdiction over the defendant.

[4] Section 1237.5 reads in pertinent part as follows: "No appeal shall be taken by the defendant from a . . . revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

section 1237.5, as long as defendant seeks appellate review of postadmission proceedings only, and does not challenge the validity of the admission itself].)

Billetts is consistent with the settled rule that a defendant may take an appeal without a certificate of probable cause if he does so solely on grounds going to postplea matters not challenging the validity of his plea. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1096.) The issue in *Billetts* was whether a defendant's claims that he was deprived of a revocation hearing, and not informed of the consequences of admitting a probation violation, could be raised on appeal absent a certificate of probable cause. (*Billetts, supra*, 89 Cal.App.3d at p. 308.) The appellate court held because these issues "all relate[d] to matters which occurred prior to and affect the validity of his admission of violation," they were not cognizable on appeal absent a certificate. (*Ibid*.) *Billetts* did not address whether speedy trial issues arising during pre-admission proceedings were subject to the same analysis.

Defendant relies on two cases involving speedy trial issues, *People v. Brown* (1968) 260 Cal.App.2d 745 (*Brown*) and *People v. Broughton* (2003) 107 Cal.App.4th 307 (*Broughton*). These cases state in dicta that no certificate of probable cause is required to preserve statutory speedy trial issues for appeal. (*Broughton,* at p. 313, fn. 5; *Brown,* at pp. 746–747.) However, neither *Brown* nor *Broughton* is persuasive in the factual circumstances of this case. In *Brown*, the speedy trial issue arose *after* the defendant's guilty plea. (*Brown,* at pp. 747–748.) Under those circumstances, the denial of a speedy trial could not have affected the validity of the earlier plea, and no probable cause certificate was necessary to preserve that issue for appeal. (*Id.* at pp. 746–747.) The same situation existed in *Broughton*: The defendant had admitted probation violations arising in two cases and was awaiting sentencing when she brought a motion to dismiss both cases on speedy trial grounds. (*Broughton,* at pp. 312–313.) Moreover, the defendants in both *Brown* and *Broughton* had in fact filed certificates of probable cause, making the discussion of the issue in these cases pure dicta. (*Brown,* at p. 746; *Broughton,* at p. 313.)

In *People v. Hayton* (1979) 95 Cal.App.3d 413 (*Hayton*), another panel of this court held that the usual type of speedy trial claim—in which a defendant asserts that the delay in bringing him to trial has frustrated his ability to establish his innocence—is not cognizable on appeal. (*Id.* at p. 419.) The court reasoned that once a guilty plea is entered, "there is no innocence to be established" because the plea "admits every element of the offense charged." (*Ibid.*) Where the defendant, after pleading guilty, challenges the judgment on the theory that he was deprived of a full opportunity to prove his innocence, such a claim is not reviewable, regardless of whether the defendant has managed to obtain a certificate of probable cause. (*Id.* at pp. 416–417.)

But the converse is also true. If the defendant is not claiming that he could have proven his innocence had he gone to trial sooner, but asserts some other form of prejudice, such as loss of the opportunity for a concurrent sentence, no certificate of probable cause is necessary because the validity of the plea or admission is not placed in issue by the appeal. The importance of this distinction is illustrated in *People v. Gutierrez* (1994) 30 Cal.App.4th 105 (*Gutierrez*) which held specifically that the denial of a motion to dismiss under section 1381 is reviewable despite a subsequent guilty plea. In explaining the rationale for its holding, the *Gutierrez* court emphasized that section 1381 is primarily intended to afford prisoners an opportunity to obtain concurrent sentences on pending matters. (*Id.* at p. 109.) The court recognized that the usual claim of prejudice from the denial of a speedy trial, loss of the opportunity to prove innocence, presents a different question. (*Id.* at pp. 108–109, 111–112.) As stated in *Hayton*, *supra*, a guilty plea makes the usual claim of prejudice from the passage of time unreviewable because the plea removes the defendant's guilt or innocence as an issue in the case. (*Gutierrez,* at pp. 108–109, 111–112.)

The issue of whether a certificate of probable cause was required was not before the court in *Gutierrez* because the appellant had secured one from the trial court. (*Gutierrez, supra*, 30 Cal.App.4th at p. 108.) At one point, the opinion suggests that a section 1381 claim is cognizable on appeal after a guilty plea because it goes to the legality of the proceedings. (*Ibid*.) Issues going the legality of the proceedings do

require compliance with section 1237.5. (See § 1237.5, subd. (a); *People v. Mendez*, *supra*, 19 Cal.4th at p. 1088.) But as we read *Gutierrez* and *Hayton*, and as we hold in this case, a defendant claiming prejudice from the loss of concurrent sentencing is not thereby challenging the legality of the proceedings or the validity of his plea. Accordingly, no certificate would be necessary to prosecute such an appeal.

In this case, defendant makes no claim of prejudice based on any diminished opportunity to prove that he did not violate his probation. His claim is based solely on: (1) the two months of county jail time that he served following his release from state prison while awaiting a probation revocation hearing; and (2) being subjected to a two-year extension of his probationary period. Accordingly, we hold that defendant was not required to obtain a certificate of probable cause in order to pursue this appeal.

Denial of Section 1381 Motion

Defendant contends that the trial court erroneously denied his motion to dismiss the probation revocation proceedings under section 1381.[5] He concedes that he never successfully filed a demand for trial as required under that statute, but argues that his noncompliance was excused under recognized case law because Solano County failed to place a hold or detainer on him for his probation violation until just before he was released from state prison. Before reaching the merits of the issue, we consider the People's argument that, as a matter of law, section 1381 has no application to probation violation proceedings.

An incarcerated defendant's right to demand a speedy trial under section 1381 arises when, at the time his term of imprisonment in state prison begins, "there is pending, in any court of this state, any other indictment, information, complaint, or any criminal proceeding wherein the defendant remains to be sentenced." The quoted language also appears nearly verbatim in section 1381.5, a statute giving inmates of federal correctional institutions a parallel right to demand trial or sentencing in a matter

[5] We note that in the trial court defendant actually sought termination of his probation status rather than dismissal of the revocation proceedings.

pending in state court. In *Broughton*, *supra*, a divided panel of the Second Appellate District held as a matter of statutory interpretation that section 1381.5 does not apply to probation revocation proceedings. The majority reasoned that a defendant facing probation revocation has in fact already been tried, convicted, and sentenced for the underlying offense and, therefore, does not " 'remain[] to be sentenced' " within the meaning of section 1381.5. (*Broughton, supra*, 107 Cal.App.4th at p. 316.) Based on the statute's text and history, the *Broughton* majority concluded that the Legislature did not intend section 1381.5 to apply to federal inmates facing state probation revocation proceedings, and that the sole remedy for such inmates would lie under section 1203.2a. (*Id.* at pp. 315–321.) As the *Broughton* majority acknowledges, there is no basis for distinguishing between sections 1381 and 1381.5 for purposes of deciding whether probationers were intended to be covered. (*Id.* at pp. 315–316.)

The dissenting justice in *Broughton* argued that the broad phrase, "any criminal proceeding wherein the defendant remains to be sentenced," must be construed to encompass a defendant released on probation against whom revocation proceedings were still pending. (*Broughton, supra*, 107 Cal.App.4th at pp. 324–326 (dis. opn. of Johnson, J.).) Earlier cases have also found, albeit without extended analysis, that sections 1381 and 1381.5 do apply to probation revocation proceedings. (See *Rudman v. Superior Court* (1973) 36 Cal.App.3d 22, 26–27; *Boles v. Superior Court* (1974) 37 Cal.App.3d 479, 484; *People v. Johnson* (1987) 195 Cal.App.3d 510, 514, disapproved on another ground in *In re Hoddinott* (1996) 12 Cal.4th 992, 1005.)

Notwithstanding the People's invitation to join this debate, we decline to do so. For purposes of our analysis, we will assume without deciding that section 1381 does afford a remedy for state prison inmates facing probation revocation proceedings in another case. For the reasons developed below, we nonetheless hold that the trial court properly denied defendant's section 1381 motion.

Section 1381 requires that the inmate "shall have delivered to [the] district attorney" written notice of "his . . . desire to be brought to trial or for sentencing." To warrant relief under section 1381, an inmate must strictly comply with its requirements.

(*Gutierrez, supra*, 30 Cal.App.4th at p. 111.) For example, as the defendant in this case was correctly advised, demands served while an inmate is in county jail awaiting transfer to state prison are ineffective to start the 90-day time period provided for the district attorney to bring him to trial or for sentencing. (*People v. Clark* (1985) 172 Cal.App.3d 975, 980–981.) The burden of proving literal compliance with the statute is on the defendant. (*People v. Ruster* (1974) 40 Cal.App.3d 865, 873, disapproved on other grounds in *In re Hoddinott*, *supra*, 12 Cal.4th at p. 1005.)

The case law recognizes specific circumstances in which strict compliance with section 1381 may be excused. Where the authorities fail to notify the defendant of the pending case and of the means of invoking his rights under that statute, his failure to serve a demand on the district attorney is excused. (*In re Mugica* (1968) 69 Cal.2d 516, 523–524; *People v. Martinez* (1995) 37 Cal.App.4th 1589, 1596 (*Martinez*).) As stated in *Martinez*, " '[w]here no notice is given to alert a prisoner of his right to exercise his rights under Penal Code section 1381, his failure to request prompt disposition of his case is excused.' " (*Martinez*, at p. 1596.) In *Martinez*, the defendant had inquired whether charges were pending against him, and was erroneously informed that there was no hold, detainer, or outstanding warrant against him. (*Id.* at pp. 1596–1597.) The appellate court found that this error cost defendant the opportunity to make a section 1381 demand, obtain an earlier trial, and serve a concurrent sentence. (*Id.* at p. 1597.) On that basis, it upheld the trial court's ruling dismissing the charges. (*Ibid.*)

Martinez is distinguishable from the case before us. By his own admission, the defendant in this case was under no misapprehension about the pendency of a probation violation proceeding. According to defendant's offer of proof, he first attempted to file a section 1381 demand while in county jail sentenced to state prison. There, he was correctly informed that he should wait to file any demand until he arrived at state prison. Once in state prison—again according to his own offer of proof—defendant filled out a form demanding trial in compliance with section 1381, and gave it to his counselor. He also offered to testify that *he was told*, a few days before his release, that no Solano County hold or detainer had been placed on him, and he did not learn until his release

date that Solano County did have a hold. Significantly, defendant made no offer of proof that the asserted absence of a detainer or hold earlier in his prison term had either (1) misled him into believing that no revocation proceedings were pending against him, or (2) caused prison officials to refuse to process his 1381 demand.

On this record, defendant failed to demonstrate any excuse for noncompliance. First, he did not establish his premise that the Solano County hold was not placed until the end of his term with an offer of competent, nonhearsay evidence on that point. Second, even assuming for purposes of analysis that he did establish that premise, he failed to show that the absence of a hold or detainer misled him into believing that the revocation matter had gone away. To the contrary, defendant's own offer of proof showed that he was fully aware of its pendency and of his right to have it speedily resolved by filing a section 1381 demand. Third, defendant made no offer of proof that the presumed absence of a hold or detainer caused his 1381 demand to be rejected before it could be served on the district attorney. Defendant suggests on appeal that he made an "offer of proof" in the trial court "that he attempted to file a section 1381 demand, but was unable to do so because of the failure of the state to place a hold or detainer on him." The record does not bear this out. At the hearing on defendant's motion, his counsel merely asserted that the Department of Corrections "won't let you file a 1381 unless there is a detainer placed." Counsel made no offer of proof that defendant was prevented from filing his section 1381 demand. To the contrary, defendant's position in the trial court was that he prepared a demand and gave it to his counselor.

In the end, the evidence in support of defendant's motion consisted of no more than his own unsubstantiated and self-serving claim that he had given the demand to his counselor. He admitted there was no evidence that any such demand was received by the district attorney or the probation department. Although the trial court continued the original hearing date, and then denied the motion without prejudice to afford defendant the maximum opportunity to locate any witnesses or records that could substantiate his claim, he was unable to do so. On this record, and without regard to whether defendant suffered any demonstrable prejudice from the delay in holding the probation revocation

hearing, the trial court did not abuse its discretion in denying defendant's section 1381 motion.

Section 1203.2a Claim

Defendant also contends that the trial court should have dismissed the probation revocation proceedings pursuant to section 1203.2a. Under that section, the trial court loses jurisdiction over a defendant who has properly notified probation authorities of his willingness to be sentenced for a pending probation violation in absentia and without counsel, if it does not sentence him within 30 days after his request.

Although a compelling argument can be made that defendant waived the protection of section 1203.2a by failing to allege the filing of any document in compliance with its requirements, and by failing to raise its provisions in his motion to dismiss in the trial court, the claim also fails on its merits. For the reasons stated above, defendant failed to establish any excuse for noncompliance. He did not establish either that there was a delay placing a hold or detainer on him or that he was actually misled about his rights by such a delay, assuming that it did occur. He has also failed to demonstrate that he would have been willing to submit to sentencing under the particularized terms required by section 1203.2a. Absent strict compliance with those terms, the trial court cannot be divested of jurisdiction over a probationer. (*People v. Davidson* (1972) 25 Cal.App.3d 79, 84.)

We find no violation of defendant's speedy trial rights under section 1203.2a.

DISPOSITION

The judgment is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Stein, J.